A

YAP YOU JEE v. PP & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF PCA
MOHTARUDIN BAKI JCA
TENGKU MAIMUN TUAN MAT JCA
B [CRIMINAL APPEALS NO: J-09-112-04-2012, J-09-111-04-2012 & J-09-117-04-2012]
15 JUNE 2015

C ***CRIMINAL PROCEDURE:*** *Charge – Amendment – Amendments to charges at close of prosecution's case – No grounds written justifying amendments – Whether amendments introduced different case against accused persons – Facts failing to establish prima facie case against accused persons on original charge preferred – Facts disclosing another offence for which accused persons not charged – Whether court ought to amend charge – Whether any prejudice occasioned to accused persons*

D ***CRIMINAL PROCEDURE:*** *Judgment – Grounds of judgment – No grounds of judgment written by trial judge to justify amendments to charges at close of prosecution's case – No written grounds provided in respect of trial judge's findings that prima facie case established and defence ought to be called – Whether any prejudice occasioned to accused persons – Whether any statutory provision requiring*
E *trial judge to prepare grounds of judgment for finding prima facie case established*

CRIMINAL PROCEDURE: *Sentencing – Appeals – Approach of appellate court in sentencing – Whether ought to be slow to disturb sentences passed by trial court – Whether sentences ought to be concurrent or consecutive – Principles to assist*
F *appellate court*

CRIMINAL PROCEDURE: *Trial – Trial de novo – Change of judge during hearing – Whether previous judge retained jurisdiction in matter – Whether previous judge may continue and complete case that was partly heard – Whether succeeding judge has discretion to either hear case de novo or to continue from point*
G *where it had been left by previous judge – Whether directive given by Chief Judge to succeeding judge to continue part heard case purely an administrative directive – Whether directive could fetter discretion of succeeding judge – Whether directive had prejudiced accused persons – Whether in breach of s. 261 of Criminal Procedure Code*

H ***CRIMINAL PROCEDURE:*** *Witness – Statement – Admissibility – Statement of witness admitted under s. 32 of Evidence Act 1950 – Witness absent and not called at trial – Whether incriminatory statement of witness ought to be admitted – Whether failure of police to make use of ss. 47, 49, 118 & 396 of Criminal Procedure Code rendered statement of witness inadmissible*

I The three appellants were initially charged with various offences under s. 420 and s. 109 of the Penal Code and were tried in the Sessions Court. At the close of the prosecution's case, the prosecution applied to amend the charges against all the appellants. The amendment entailed the insertion of

common intention under s. 34 of the Penal Code and the particularisation of the deception. Alternative charges were also preferred against all the appellants. As against the third appellant, there was an additional charge. The Sessions Judge ('the previous SCJ') allowed the amendment of the charges and found that the prosecution had made out a *prima facie* case on one amended charge against the first appellant, on three amended charges against the second appellant and on one amended and one additional charge against the third appellant. The appellants were ordered to enter their defence on the amended charges. The previous SCJ was subsequently transferred and no written grounds were provided for the *prima facie* case finding. The defence was heard by a new Sessions Judge ('the succeeding SCJ'). All three appellants gave evidence under oath. At the end of the defence case, the succeeding SCJ found that the appellants had failed to raise a reasonable doubt on the prosecution's case. In her grounds of judgment, the succeeding SCJ stated that since she had been directed to continue at the defence case, there was no need for her to re-visit or review the prosecution's case, which had been considered by the previous SCJ in deciding that the prosecution had made out a *prima facie* case against the appellants. The succeeding SCJ convicted and sentenced the appellants to various terms of imprisonment. Each of the three appellants appealed to the High Court. The High Court, however, affirmed the convictions and the sentences imposed by the succeeding SCJ. The appellants appealed to the Court of Appeal. The main grounds of appeal concerned: (i) the amendment of the charges; (ii) the absence of the grounds of judgment by the previous SCJ at the end of the prosecution's case; (iii) the application of s. 261 of the Criminal Procedure Code ('CPC'); (iv) the error on the part of the succeeding SCJ in failing to reconsider the prosecution's case and in dealing with only the defence case; (v) whether a statement ('exh P97') made by one Raizul incriminating the second and third appellants was properly admitted under s. 32 of the Evidence Act 1950 notwithstanding failure by the police to use ss. 47, 49, 118 and 396 of the CPC; (vi) the subject matter of the charges; and (vii) the credibility of a witness ('SP17') whose evidence was not in favour of the prosecution.

Held (dismissing appeals)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) Although there were no grounds of judgment written by the previous SCJ to justify the amendments, the Court of Appeal agreed with the findings of the High Court that no prejudice had been occasioned to the appellants. The amendments did not introduce a different case against the appellants. The amendments sought to add the elements of cheating and to introduce s. 34 of the Penal Code, based on substantially the same facts. Where the facts do not establish a *prima facie* case against the accused on the charge preferred against him but

discloses another offence for which he is not charged, the court ought to amend the charge unless there is good reason not to do so. (paras 32 & 33)

(2) There is no statutory provision requiring a trial judge to prepare grounds of judgment in finding a *prima facie* case and in calling for the defence. In the instant case, the absence of the grounds of the judgment had not prejudiced the appellants. What was more important at the close of the case for the prosecution, was for the accused to know what was it that he had to answer in his defence. It was not the case here that the appellants were prejudiced for not being able to put up their defences properly. (paras 34 & 35)

(3) Where a Magistrate or a Sessions Court Judge has been transferred to another state, he retains the jurisdiction in the matter and he may continue and complete the cases that he has heard partly. However, to save time and money and to expedite the disposal of part-heard cases, the succeeding Magistrate or Sessions Court Judge may continue the trial from where the predecessor left. (para 38)

(4) The 'directive' given to the succeeding SCJ did not amount to a breach of the provisions of s. 261. It is a practice for the Chief Judge or the Chief Registrar to decide on whether part-heard cases would be completed either by the previous presiding Magistrate or SCJ or by his successor. This decision or 'directive' is purely administrative and given with the primary purpose to speed up the disposal of part-heard cases. The 'directive', which is given administratively, could not and did not in any way fetter the discretion of the succeeding Magistrate or SCJ provided for under s. 261 of the CPC. The duty remains on the Magistrate or the SCJ to act under the provisions of s. 261 of the CPC. In particular, if the succeeding Magistrate or SCJ acts on the evidence which has been recorded by his predecessor, the right to recall witnesses must be observed. In this appeal, there was no issue on the right of the appellants to recall witnesses. In the circumstances, the 'directive' given to the succeeding SCJ had not prejudiced the appellants and had not breached s. 261 of the CPC. (para 40)

(5) The succeeding SCJ had not considered the defence in isolation but had tested the defence in light of the case for the prosecution. There was sufficient compliance by the succeeding SCJ with s. 173(m)(i) of the CPC. Even if the grounds of the succeeding SCJ was lacking, the High Court Judge had meticulously examined the evidence of the prosecution for each instance of the cheating. The High Court Judge had also rightly considered the elements of the offence and had looked at all the evidence in making his findings that both the SCJs were correct in calling for the defence and that the defence had failed to raise a reasonable doubt on the prosecution's case, respectively. (paras 43, 44, 45 & 46)

(6) The High Court Judge was also correct on the issue of common intention. The non-calling of Rosnani by the prosecution did not create a gap in the prosecution's case, given that there was no dispute as to her identity. The conduct of the third appellant, though subsequent to the deception of SP1, was relevant under s. 8 of the Evidence Act 1950. The High Court Judge had correctly made inferences from the act or conduct of the appellants in coming to the conclusion that the appellants had the common intention to deceive SP1. (para 53)

(7) The actions of the police in searching for Raizul at his address, placing an advertisement in the newspapers and seeking the assistance of the Interpol were reasonable efforts taken by the police to trace Raizul. The failure of the police to make use of ss. 47, 49, 118 and 396 of the CPC did not render the statement of Raizul inadmissible. Exhibit P97 was correctly admitted under s. 32 of the Evidence Act 1950. Raizul was an accessory after a fact and could not be an accomplice in the commission of the original offence. The events recorded in his statement were corroborated by SP12 and SP24, notwithstanding the usual corroboration warning. No miscarriage had been occasioned to the appellants by the admission of exh. P97. (paras 57 & 59)

(8) On a maximum evaluation of the evidence led by the prosecution, the elements of the offence in the charges had been proved. The High Court Judge did not err in his finding that the evidence adduced by the prosecution disclosed a *prima facie* case for the appellants to answer. The succeeding SCJ had considered the defence as against the evidence of the prosecution in coming to the conclusion that the appellants had failed to raise a reasonable doubt on the prosecution's case. There was no reason to depart from the findings of the succeeding SCJ and High Court Judge. The necessary inferences drawn from the circumstances, taken cumulatively, were that the appellants were part of and privy to the plan to deceive SP1. The convictions were safe. (paras 65, 66, 70 & 71)

(9) An appellate court should be slow to disturb the sentence passed by the trial court unless the sentence was manifestly wrong in the sense of being illegal or being unsuitable to the proved facts and circumstances. In the instant case, the succeeding SCJ had considered both the public interest and the interest of the appellants and had taken into account the age of the appellants; the fact that the appellants were first offenders; that the offence was a serious offence as it involved a big amount of money and that it had implicated the State Government and the Menteri Besar. The succeeding SCJ had also considered the fact that the victim could not recover the money and that no punishment of whipping could be imposed on the appellants due to their age. The succeeding SCJ had thus taken into consideration

relevant factors in imposing sentence and it has not been shown that the succeeding SCJ had embarked on some extraneous or irrelevant factor in imposing the sentences against the appellants. Thus, there was no reason to disturb the sentences imposed by the succeeding SCJ which had been affirmed by the High Court. The sentences were appropriate in the circumstances of the case. (paras 73 & 74)

(10) In respect of the second and third appellants, in determining whether the sentences should be concurrent or consecutive, the Court of Appeal would be guided by the one transaction rule where the following four elements had to be present, namely: proximity of time, proximity of place, continuity of action and continuity of purpose or design. In the instant appeal, there was no proximity of time and place as the charges related to different dates and places and different purposes. Further, the aggregate sentences did not offend the totality principle. (para 75)

Bahasa Malaysia *Translation Of Headnotes*

Ketiga-tiga perayu pada mulanya didakwa dengan pelbagai kesalahan di bawah s. 420 dan s. 109 Kanun Keseksaan. Perayu-perayu telah dibicarakan di Mahkamah Sesyen. Pada akhir kes pendakwaan, pihak pendakwaan memohon untuk meminda pertuduhan terhadap kesemua perayu. Pindaan tersebut melibatkan kemasukan niat bersama di bawah s. 34 Kanun Keseksaan dan pembutiran penipuan. Pertuduhan alternatif juga dikenakan terhadap kesemua perayu. Bagi perayu ketiga, terdapat pertuduhan tambahan dikenakan. Hakim Mahkamah Sesyen ('HMS terdahulu') membenarkan pindaan pertuduhan dan mendapati bahawa pihak pendakwaan telah membuktikan kes *prima facie* atas pertuduhan pindaan terhadap perayu pertama, tiga pertuduhan pindaan terhadap perayu kedua dan pada satu pindaan dan satu pertuduhan tambahan terhadap perayu ketiga. Perayu-perayu telah diarahkan untuk membela diri terhadap pertuduhan-pertuduhan pindaan. HMS terdahulu kemudiannya telah dipindahkan dan tiada alasan bertulis disediakan bagi dapatan kes *prima facie* tersebut. Pembelaan didengar oleh Hakim Mahkamah Sesyen yang baru ('HMS terkemudian'). Ketiga-tiga perayu telah memberikan keterangan di bawah sumpah. Pada akhir kes pihak pembelaan, HMS terkemudian mendapati bahawa perayu-perayu telah gagal menimbulkan keraguan munasabah terhadap kes pendakwaan. Dalam alasan penghakimannya, HMS terkemudian menyatakan bahawa oleh kerana beliau telah diarahkan untuk meneruskan dengan kes pembelaan, tidak ada keperluan baginya untuk melawat semula atau mengkaji semula kes pendakwaan yang telah dipertimbangkan oleh HMS terkemudian dalam memutuskan bahawa pihak pendakwaan telah menyediakan kes *prima facie* terhadap perayu-perayu. HMS terdahulu telah menyabit dan menjatuhkan hukuman terhadap perayu-perayu kepada pelbagai tempoh penjara. Setiap satu daripada ketiga-tiga perayu membuat rayuan kepada Mahkamah Tinggi.

Mahkamah Tinggi, walau bagaimanapun, mengesahkan sabitan dan hukuman yang dikenakan oleh HMS terkemudian. Perayu-perayu merayu kepada Mahkamah Rayuan. Alasan-alasan utama rayuan adalah berkaitan dengan: (i) pindaan terhadap pertuduhan; (ii) ketiadaan alasan penghakiman oleh HMS terdahulu pada akhir kes pendakwaan; (iii) pemakaian s. 261 Kanun Tatacara Jenayah ('KTJ'); (iv) kekhilafan oleh HMS terkemudian dalam kegagalannya untuk mempertimbangkan semula kes pendakwaan dan hanya mempertimbangkan kes pembelaan; (v) sama ada kenyataan ('eks P97') yang dibuat oleh satu Raizul mengesahkan keterlibatan perayu kedua dan ketiga diterima pakai di bawah s. 32 Akta Keterangan 1950 walaupun pihak polis gagal menggunakan ss. 47, 49, 118 and 396 KTJ; (iv) hal perkara pertuduhan; dan (vii) kredibiliti saksi ('SP17') yang keterangannya tidak memihak pihak pendakwaan.

Diputuskan (menolak rayuan-rayuan)
Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Walaupun tiada alasan-alasan penghakiman ditulis oleh HMS terdahulu untuk menjustifikasikan pindaan-pindaan, Mahkamah Rayuan bersetuju dengan keputusan Mahkamah Tinggi bahawa tiada prejudis berlaku kepada perayu-perayu. Pindaan-pindaan tidak memperkenalkan kes yang berbeza terhadap perayu-perayu. Pindaan-pindaan yang dipohon bertujuan untuk menambah unsur-unsur penipuan dan untuk memperkenalkan s. 34 Kanun Keseksaan sebahagian besarnya berdasarkan fakta yang sama. Di mana fakta tidak mewujudkan kes *prima facie* terhadap tertuduh atas pertuduhan terhadapnya tetapi mendedahkan kesalahan yang lain di mana dia tidak didakwa, mahkamah harus meminda pertuduhan melainkan terdapat alasan baik untuk tidak berbuat demikian.

(2) Tiada peruntukan statutori yang memerlukan hakim bicara menyediakan alasan penghakiman dalam mencari kes *prima facie* dan dalam memanggil pembelaan. Dalam kes ini, ketiadaan alasan dalam penghakiman tidak menjejaskan perayu-perayu. Apa yang lebih penting pada akhir kes pendakwaan adalah bagi tertuduh untuk mengetahui apa yang dia harus jawab dalam pembelaannya. Kes di sini bukan sesuatu di mana perayu-perayu telah diprejudis kerana tidak dapat mengemukakan pembelaan mereka dengan betul.

(3) Di mana Majistret atau HMS telah dipindahkan ke negeri lain, beliau mengekalkan bidang kuasa dalam perkara tersebut dan beliau boleh meneruskan dan menyiapkan kes-kes yang separa didengarnya. Walau bagaimanapun, bagi menjimatkan masa dan wang dan untuk mempercepatkan penyelesaian kes-kes yang dibicarakan sebahagiannya, Majistret atau HMS terkemudian boleh meneruskan perbicaraan dari mana pendulu meninggalkannya.

(4) 'Arahan' yang diberikan kepada HMS terkemudian tidak bermakna kemungkiran kepada peruntukan s. 261. Ia adalah satu amalan bagi Hakim Besar atau Ketua Pendaftar untuk menentukan sama ada kes yang sebahagiannya dibicarakan akan diselesaikan oleh Majistret atau HMS terdahulu atau oleh penggantinya. Keputusan ini atau 'arahan' adalah pentadbiran semata-mata dan diberikan dengan tujuan utama untuk mempercepatkan penyelesaian kes-kes yang sebahagiannya telah dibicarakan. 'Arahan' yang diberi secara pentadbiran tidak boleh atau tidak dalam apa-apa cara mengekang budi bicara Majistret atau HMS terkemudian yang diperuntukkan di bawah s. 261 KTJ. Tugas tersebut masih di bawah Majistret atau HMS untuk bertindak di bawah peruntukan s. 261 KTJ. Khususnya, jika Majistret atau HMS terkemudian bertindak berdasarkan keterangan yang telah direkodkan oleh pendulunya, hak untuk memanggil saksi-saksi mesti diperhatikan. Dalam rayuan ini, tidak timbul isu mengenai hak perayu-perayu untuk memanggil semula saksi-saksi. Dalam keadaan ini, 'arahan' yang diberikan kepada HMS terkemudian tidak memprejudiskan perayu dan tidak melanggar s. 261 KTJ.

(5) HMS terkemudian tidak mempertimbangkan pembelaan secara berasingan tetapi telah menguji pembelaan berdasarkan kes pendakwaan. Terdapat pematuhan yang sewajarnya oleh HMS terkemudian dengan s. 172(m)(i) KTJ. Walaupun alasan HMS terkemudian tidak mencukupi, Hakim Mahkamah Tinggi telah memeriksa dengan teliti keterangan pihak pendakwaan untuk setiap kejadian penipuan. Hakim Mahkamah Tinggi juga telah dengan betul mempertimbangkan unsur-unsur kesalahan itu dan telah mengambil kira kesemua keterangan dalam membuat dapatan bahawa kedua-dua HMS masing-masing adalah betul dalam memanggil pembelaan dan pihak pembelaan telah gagal untuk menimbulkan keraguan munasabah ke atas kes pendakwaan.

(6) Hakim Mahkamah Tinggi adalah betul mengenai isu niat bersama. Kegagalan untuk memanggil Rosnani oleh pihak pendakwaan tidak mewujudkan jurang dalam kes pendakwaan memandangkan tidak ada pertikaian tentang identitinya. Tindakan perayu ketiga walaupun selepas penipuan SP1 adalah relevan di bawah s. 8 Akta Keterangan 1950. Hakim Mahkamah Tinggi telah dengan betul membuat inferens dari perbuatan atau kelakuan perayu-perayu dalam membuat kesimpulannya bahawa perayu-perayu mempunyai niat bersama untuk memperdayakan SP1.

(7) Tindakan polis dalam mencari Raizul di alamatnya, meletakkan iklan di akhbar dan meminta bantuan Interpol adalah usaha munasabah diambil oleh polis untuk mengesan Raizul. Kegagalan pihak polis untuk memanfaatkan ss. 47, 49, 118 dan 396 KTJ tidak menjadikan kenyataan Raizul tidak boleh diterima masuk. Eksibit P97 telah

diterima masuk di bawah s. 32 Akta Keterangan 1950. Raizul adalah peserta selepas fakta dan tidak mungkin menjadi rakan sejenayah dalam melakukan kesalahan yang asal. Kejadian-kejadian yang termaktub dalam kenyataannya telah disokong oleh keterangan SP12 dan SP24, walaupun amaran sokongan biasa diberi. Tiada salahlaksana keadilan berlaku kepada perayu-perayu dengan kemasukan eks. P97.

(8) Atas penilaian maksimum keterangan yang dikemukakan oleh pihak pendakwaan, unsur-unsur kesalahan dalam pertuduhan telah dibuktikan. Hakim Mahkamah Tinggi tidak terkhilaf dalam dapatannya bahawa keterangan yang dikemukakan oleh pihak pendakwaan mendedahkan suatu kes *prima facie* untuk dijawab oleh perayu-perayu. HMS terkemudian telah menimbangkan pembelaan terhadap keterangan pihak pendakwaan dalam membuat kesimpulan bahawa perayu-perayu telah gagal untuk menimbulkan keraguan munasabah dalam kes pendakwaan. Tiada alasan untuk menyimpang daripada dapatan HMS terkemudian dan Hakim Mahkamah Tinggi. Inferens yang perlu dibuat berdasarkan keadaan yang diambil secara kumulatif adalah bahawa perayu-perayu adalah sebahagian daripada dan privy kepada rancangan untuk menipu SP1. Pensabitan adalah selamat.

(9) Mahkamah Rayuan tidak boleh tergesa-gesa mengganggu hukuman yang dijatuhkan oleh mahkamah perbicaraan melainkan hukuman tersebut nyata salah di mana ia adalah salah di sisi undang-undang atau tidak sesuai dengan fakta dan keadaan yang dibuktikan. Dalam kes ini, HMS terkemudian harus mengambil kira kedua-dua kepentingan awam dan kepentingan perayu-perayu dan harus mengambil kira usia perayu-perayu; fakta bahawa perayu-perayu adalah pesalah pertama; bahawa kesalahan tersebut adalah satu kesalahan yang serius kerana ia melibatkan jumlah wang yang besar dan ia melibatkan Kerajaan Negeri dan Menteri Besar. HMS terkemudian turut mempertimbangkan fakta bahawa mangsa tidak akan mendapatkan kembali wang dan tiada hukuman sebat boleh dikenakan ke atas perayu-perayu disebabkan usia mereka. HMS terkemudian dengan itu, mengambil kira faktor relevan dalam menjatuhkan hukuman dan ia tidak menunjukkan bahawa HMS terkemudian telah mengenakan beberapa faktor tidak berkaitan atau faktor tidak relevan dalam menjatuhkan hukuman terhadap perayu-perayu. Oleh itu, tiada alasan untuk mengganggu hukuman yang telah dikenakan oleh HMS terkemudian seperti yang telah disahkan oleh Mahkamah Tinggi. Hukuman adalah sesuai berdasarkan keadaan kes.

(10) Berhubung dengan perayu kedua dan ketiga dalam menentukan sama ada hukuman harus dijalankan serentak atau berturut-turut, Mahkamah Rayuan akan berpandukan kepada rukun satu transaksi di mana empat unsur-unsur berikut harus wujud, iaitu: kedekatan masa, kedekatan tempat, kesinambungan tindakan dan kesinambungan tujuan atau reka bentuk. Dalam rayuan ini, tiada kedekatan masa dan tempat kerana pertuduhan berkaitan dengan masa dan tempat yang berbeza dan juga perbezaan tujuan. Selanjutnya, agregat hukuman tidak bertentangan dengan prinsip keseluruhan.

Case(s) referred to:

Abdul Hamid Udin v. PP [2000] 1 LNS 198 HC ***(refd)***
Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(refd)***
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Junaidi Abdullah v. PP [1993] 4 CLJ 201 SC ***(refd)***
Kuan Ted Fatt v. PP [1985] 1 CLJ 150; [1985] CLJ (Rep) 174 FC ***(refd)***
Mahbub Shah v. Emperor [1945] 46 Cr LJ 689 ***(refd)***
PP v. Dato' Waad Mansor [2005] 1 CLJ 421 FC ***(refd)***
PP v. Goh Chooi Guan [1978] 2 MLJ 169 ***(dist)***
PP v. James Tan [1983] 1 LNS 24 HC ***(refd)***
PP v. Jorge Enrique Pellon Tellon [1998] 4 CLJ 278 CA ***(refd)***
PP v. Lee Jun Ho & Ors [2009] 4 CLJ 90 HC ***(dist)***
PP v. Ma'arif [1969] 1 LNS 134 HC ***(refd)***
PP v. Mohamed Nor & Ors [1985] 1 LNS 170 SC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 47, 49, 112, 118, 173(h)(ii), (m)(i), 261, 294, 396
Evidence Act 1950, ss. 8, 32
Penal Code, s. 34

(Criminal Appeal No: J-09-112-04-2012)
For the appellant - Gooi Soon Seng (Christy Lim Ying Ying with him); M/s Gooi & Azura
For the respondent - Dzulkifli Ahmad (Awang Armadajaya Awang Mahmud with him); DPP

(Criminal Appeal No: J-09-111-04-2012)
For the appellant - S Prakash; M/s Kamil Hashim Raj & Lim
For the respondent - Dzulkifli Ahmad (Awang Armadajaya Awang Mahmud with him); DPP

(Criminal Appeal No: J-09-117-04-2012)
For the appellant - Gobind Singh Deo (Mohd Haijan Omar & Joanne Chua Tsu Fae with him); M/s Gobind Singh Deo & Co
For the respondent - Dzulkifli Ahmad (Awang Armadajaya Awang Mahmud with him); DPP

[Appeal from High Court, Johor Bahru; Criminal Appeals No: 42S-22-2010, MT(3) 42S-20-2010 & 42S-16-2010]

Reported by Olivia Poh

JUDGMENT

Tengku Maimun Tuan Mat JCA:

Introduction

[1] These three appeals arose out of the decision of the High Court at Johor Bahru in affirming the convictions and sentences passed by the Sessions Court against the three appellants for the offence of cheating. The original charges against the appellants read:

(a) The first appellant

> Bahawa kamu di antara 28 Jun 1995 hingga 25 Julai 1995, di Hotel Hyatt Regency, Jalan Sungai Chat, di dalam daerah Johor Bahru, di dalam negeri Johor, telah menipu Dato' Ding Lian Cheon (No. K/P: K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau, supaya mempercayai bahawa kamu telah mendapatkan kelulusan dari Majlis Mesyuarat Negeri Johor untuk permohonan pembelian tanah di Lot 21448 dan Lot 1152, di Jalan Skudai, Johor Bahru, Johor dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan sekeping Cashier's Order Hong Kong and Shanghai Banking Corporation Limited, Singapore, No. 723084 yang bernilai S$3,450,000.00 atas nama Abdul Ghani bin Othman No. K/P 5834921 bertarikh 13 Julai 1995, kepada Md Jhomi bin Md Supian No. K/P 46489798 sebagai pembayaran kerana berjaya mendapat kelulusan permohonan tanah berkenaan, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 420 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

(b) The second appellant

> (i) Bahawa kamu di antara 28 Jun 1995 dan 25 Julai 1995, di Hotel Hyatt Regency, Jalan Sungai Chat, di dalam daerah Johor Bahru, di dalam negeri Johor, telah menipu Dato' Ding Lian Cheon (No. K/P : K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa kamu telah mendapatkan kelulusan dari Majlis Mesyuarat Negeri Johor untuk permohonan pembelian tanah di Lot 21448 dan Lot 1152, di Jalan Skudai, Johor Bahru, Johor oleh syarikat Solid Estate (Sarawak) Sdn Bhd dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan sekeping Cashier's Order Hong Kong and Shanghai Banking Corporation Limited, Singapore, No. 723084 yang bernilai S$3,450,000.00 atas nama Abdul Ghani bin Othman NO. K/P 5834921 bertarikh 13 Julai 1995, kepada Md Jhomi bin Md Supian No. K/P 4648978 sebagai pembayaran kerana berjaya mendapat kelulusan permohonan tanah berkenaan, yang mana Dato' Ding

A Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 420 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

(ii) Bahawa kamu pada 10hb September 1995 di Hotel Tanah Mas, Lot
B 277, Blok 5, Jalan Kampong Nyabor, di dalam daerah Sibu, di dalam Negeri Sarawak, telah menipu Dato' Ding Lian Cheon (No. K/P: K 314993) seorang pengarah syarikat Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa kamu telah mendapatkan kelulusan dari Majlis Mesyuarat Negeri Johor untuk permohonan pembelian tanah di Lot 21448 dan Lot 1152,
C Jalan Skudai, Johor Bahru, Johor, oleh syarikat Solid Estate (Sarawak) Sdn Bhd dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan wang tunai berjumlah RM2,000,000.00 kepada kamu pada 23hb September 1995, di Hotel Hyatt Regency, di Jalan Sungai Chat, di dalam daerah Johor Bahru di dalam negeri Johor, kerana telah berjaya
D mendapat pembatalan tuntutan premium dan tuntutan pelbagai tersebut bagi permohonan tanah yang berkenaan yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 420 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

E

(iii) Bahawa kamu pada 23hb September 1995 dan 27hb Oktober 1995, di alamat 17, Jalan Wong Nai Siong, di dalam daerah Sibu, di dalam Negeri Sarawak, telah menipu Dato' Ding Lian Cheon (No. K/P: K314993) seorang pengarah syarikat Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa kamu
F telah mendapatkan kelulusan dari Majlis Mesyuarat Negeri Johor untuk permohonan pembelian tanah di Lot 21448 dan Lot 1152, di Jalan Skudai, Johor Bahru, Johor dari 99 tahun kepada 999 tahun dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan wang tunai berjumlah RM1,3000,000.00 kepada kamu di Hotel Hyatt Regency, di Jalan
G Sungai Chat, di dalam daerah Johor Bahru, di dalam negeri Johor, untuk tujuan mendapatkan kelulusan tersebut, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 420 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

H

(c) The third appellant

Bahawa kamu di antara 28 Jun 1995 dan 25 Julai 1995, di Hotel Hyatt Regency, Jalan Sungai Chat, di dalam daerah Johor Bahru, di dalam negeri Johor, telah bersubahat dengan Yap You Jee
I No. K/P 490216-01-5405 dan Md Jhomi bin Md Supian No. K/P 540516-01-5375 untuk menipu Dato' Ding Lian Cheon (No. K/P: K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa kamu telah mendapatkan kelulusan dari Majlis Mesyuarat Negeri

Johor untuk permohonan pembelian tanah di Lot 21448 dan Lot 1152, di Jalan Skudai, Johor Bahru, Johor dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan sekeping Cashier's Order Hong Kong and Shanghai Banking Corporation Limited, Singapore No. 723084 yang bernilai S$3,450,000.00 atas nama Abdul Ghani bin Othman No. K/P 5834921 bertarikh 13 Julai 1995, kepada Md Jhomi bin Md Supian No. K/P 4648978 sebagai pembayaran kerana berjaya mendapat kelulusan tanah berkenaan yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian di mana kesalahan ini telah dilakukan hasil daripada persubahatan kamu dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 109 Kanun Keseksaan dibaca bersama seksyen 420 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

A B C

The Prosecution's Case

[2] The case for the prosecution may be summarised as follows. Dato' Ding Lian Cheon (SP1), a businessman from Sarawak wanted to buy lands for investment in Peninsular Malaysia. SP1's friend Loi Teck Hui (SP2) informed SP1 about some pieces of land in Johor Bahru. SP1 agreed to buy two pieces of land, namely Lots 21448 and 1142, Jalan Skudai, Johor Bahru. The lands were shown to SP1 by the first appellant, a land broker. The first appellant told SP1 that the lands belonged to the State Government of Johor and that SP1 had to pay RM7.5 million to the Menteri Besar on behalf of the State Government plus premium of not more than RM15 per sq foot. The first appellant also informed SP1 that the application must be made in writing to the Menteri Besar. For that purpose, the first appellant gave SP1 a sample letter (P2).

D E F

[3] Based on the said sample letter, SP1 prepared an application *vide* a letter addressed to the Menteri Besar of Johor (exh. P3). Exhibit P3 was given to the first appellant where the first appellant informed SP1 that he will forward the letter to the Menteri Besar. The first appellant had also written on a piece of paper (P4), the name of the Menteri Besar ie, Abdul Ghani bin Othman and the identity card number for SP1 to buy a cashier's order in the sum of RM6 million. A copy of the cashier's order was to be given to the first appellant. The first appellant wanted to see whether SP1 had the money before he could assist SP1 with the application. The cashier's order for $S3.45 million in the name as per the particulars given by the first appellant was accordingly bought by SP1.

G H

[4] Thereafter, the first appellant informed SP1 that the application for the said lands had been approved. On 25 July 1995 when SP1 came to Johor Bahru with SP2 and Chew Kwong Cheong, a valuer (SP4), the first appellant waited for SP1 at the airport. After sending SP1 to check in at Hotel Hyatt,

I

Johor Bahru, the first appellant proceeded to the then State Secretariat at Bukit Timbalan, Johor Bahru with SP2 and SP4. At Bukit Timbalan, the first appellant fetched the second appellant who was carrying a brief case and was dressed in a coat and neck tie. The first appellant got down from his car and had opened the door for the second appellant. They then met SP1 in his hotel room. The second appellant was introduced by the first appellant to SP1 as the private secretary to the Menteri Besar. The second appellant had also introduced himself to SP1 as the secretary of the Menteri Besar.

[5] In the hotel room, the second appellant took out a bundle of document from his brief case. In the presence of the first appellant, SP2 and SP4, the second appellant showed SP1 the file relating to the application for the said lands and informed SP1 that the application had been approved by the State Executive Council (EXCO). The second appellant then asked for the cashier's order. The cashier's order was given by SP1 to the second appellant who said that he will give it to the Menteri Besar. When asked by SP1 why he needed to pay when the approval had not been formally issued, the second appellant said that the political party of the Menteri Besar needed the money urgently.

[6] On 8 September 1995, the first and the second appellants went to Sibu to hand over to SP1 the approval letter from Pejabat Tanah dan Galian Johor Bahru dated 6 September 1995 (P6B) for the alienation of the Lots 21148 and 1152, Jalan Skudai, Johor Bahru. Apart from the approval letter, the second appellant also gave SP1 Form 5A (P7A) for the payment of premium in the sum of RM4,786,095. The second appellant however informed SP1 that the State Government had exempted the payment of premium. The sum has to be paid instead to his boss for political purposes. SP1 agreed to pay only RM4 million which was accepted by the second appellant. It was agreed that the RM4 million will be paid in two instalments, in the sum of RM2 million each instalment.

[7] The first payment of the RM2 million *in lieu* of the premium was made by SP1 on 23 September 1995 at Hyatt Hotel Johor Bahru. The second appellant came to the hotel with a Malay lady, who was introduced to SP1 as the wife of the Menteri Besar. The brief case containing RM2 million cash was given by SP1 to the second appellant who then gave the brief case to the wife of the Menteri Besar.

[8] SP1 was then not very happy with the lease of 99 years and wanted to extend the lease of the said lands to 999 years. The second appellant agreed to assist in extending the lease on payment of RM1 million. The payment of RM1 million was made to the second appellant on 5 October 1995 for the purpose of extending the lease. To speed up the application for the extension of the lease, a further payment of RM300,000 was made to the second appellant on 27 October 1995.

[9] In January 1996, SP1 realised that there was an error in the lot number. Whilst his application was for lot number 21448, the letter of approval (P6B) and Form 5A (P7A) stated the lot number as 21148. Upon checking with the land office, SP1 came to know that P6B and P7A were forged documents.

[10] As it turned out, there was no such approval by the EXCO and no letter was issued by the land office in respect of the said lands which in fact do not belong to the State Government. The particulars given by the first appellant for the cashier's order were not the particulars of the Menteri Besar. One Raizul bin Manap, disguised as "Abdul Ghani bin Othman" had opened the bank accounts in Singapore and Johor Bahru to facilitate the deposits and withdrawals of the monies paid by SP1. The second appellant was not the secretary to the Menteri Besar and the Malay lady who came with the second appellant to collect the RM2 million cash was not the wife of the Menteri Besar but the wife of the third appellant. SP1 then informed the first appellant about the error in the lot number and the false identity card of the Menteri Besar. The first appellant told SP1 that the first appellant would wait for his boss, Dato' Dr Johari (the third appellant) to come back from outstation to discuss the matter.

[11] A police report was subsequently lodged by SP1, leading to the police tracing the monies and resulting in the charges being preferred against the appellants as stated above.

[12] At the close of the prosecution's case, the prosecution applied to amend the charges against all the appellants. The amendment entailed the insertion of common intention under s. 34 of the Penal Code and the particularisation of the deception. Alternative charges were also preferred against all the appellants and as against the third appellant, there was an additional charge.

[13] The Sessions Judge (the previous Sessions Judge) allowed the amendment of the charges and found that the prosecution had made out a *prima facie* case on one amended charge against the first appellant, on three amended charges against the second appellant and on one amended and one additional charge against the third appellant.

[14] The appellants were ordered to enter their defence on the amended charges, which read:

(a) The first appellant

> Bahawa kamu bersama Md Jhomi bin Md Supian (No. KP 540516-01-5375) dan Hj Johari bin Mansor (No. KP: 5663719) di antara 28 Jun 1995 hingga 25 Julai 1995, di Hotel Regency, Jalan Sungai Chat, di dalam Daerah Johor Bahru, di dalam Negeri Johor dan

untuk mencapai niat bersama kamu, telah menipu Dato' Ding Lian Cheon (No. KP: K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa:

(i) tanah Lot 21448 dan Lot 1152 di Jalan Skudai, Johor Bahru adalah milik Kerajaan Negeri Johor;

(ii) tanah ini boleh dipohon untuk dibangunkan dengan bayaran RM7.5 juta dan premium tidak melebihi RM15 untuk satu kaki persegi;

(iii) kamu boleh menguruskan permohonan tersebut;

(iv) kelulusan Majlis Mesyuarat Negeri Johor telah diperolehi.

dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan sekeping Cashier's Oder Hong Kong and Shanghai Banking Corporation Limited, Singapore, No. 723084 yang bernilai "S$3,450,000.00 atas nama Abdul Ghani bin Othman, No. KP 5834921, bertarikh 13 Julai 1995, kepada Md Jhomi bin Md Supian (No. KP: 540516-01-5375) sebagai pembayaran kerana berjaya mendapat kelulusan permohonan tanah yang berkenaan, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan yang dibaca bersama seksyen 34 Kanun yang sama.

(b) The second appellant

(i) Bahawa kamu bersama Yap You Jee (No. KP: 490216-10-5405) dan Hj Johari bin Mansor (No. KP: 5663719) di antara 28 Jun hingga 25 Julai 1995, di Hotel Hyatt Regency, Jalan Sungai Chat, di dalam Daerah Johor Bahru, di dalam Negeri Johor dan untuk mencapai niat bersama kamu, telah menipu Dato' Ding Lian Cheon (No. KP: K314993) seorang pengarah Syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa:

(i) tanah Lot 21448 dan Lot 1152 di Jalan Skudai, Johor Bahru adalah milik Kerajaan Negeri;

(ii) tanah ini boleh dipohon untuk dibangunkan dengan bayaran RM7.5 juta dan premium tidak melebihi RM15 untuk satu kaki persegi;

(iii) kamu boleh menguruskan permohonan tersebut;

(iv) kelulusan Majlis Mesyuarat Negeri Johor telah diperolehi

dan dengan itu telah curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan sekeping Cashier's Order Hong Kong Shanghai Banking Corporation Limited, Singapore, No. 723084 yang bernilai S$3,450,000.00 atas nama Abdul Ghani bin Othman No. KP: 5834921, bertarikh 13 Julai 1995, kepada kamu sebagai

pembayaran kerana berjaya mendapat kelulusan permohonan tanah yang berkenaan, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan yang dibaca bersama seksyen 34 Kanun yang sama.

(ii) Bahawa kamu bersama Hj Johari bin Mansor (No. KP 5663719) pada 10 September 1995, di Hotel Tanahmas, Lot 277, Blok 5, Jalan Kampong Nyabor, di dalam Daerah Sibu, di dalam Negeri Sarawak, dan untuk mencapai niat bersama kamu, telah menipu Dato' Ding Lian Cheon (No. KP K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa kamu telah mendapatkan pembatalan tuntutan premium dan tuntutan pelbagai dari Majlis Mesyuarat Negeri Johor bagi permohonan pembelian tanah di Lot 21448 dan Lot 1152, di Jalan Skudai, Johor Bahru, Johor oleh syarikat Solid Estate (Sarawak) Sdn Bhd dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan wang tunai berjumlah RM2,000,000.00 kepada kamu pada 23 September 1995 di Hotel Hyatt Regency, di Jalan Sungai Chat, di dalam Daerah Johor Bahru, di dalam Negeri Johor, kerana telah berjaya mendapat pembatalan tuntutan premium dan tuntutan pelbagai tersebut bagi permohonan tanah yang berkenaan, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan yang dibaca bersama seksyen 34 Kanun yang sama.

(iii) Bahawa kamu pada 23 September 1995 hingga 27 Oktober 1995, di alamat 17, Jalan Wong Nai Siong, di dalam Daerah Sibu, di dalam Negeri Sarawak, telah menipu Dato' Ding Lian Cheon (No. KP: K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd, dengan memperdayakan beliau untuk mempercayai bahawa kamu boleh mendapatkan kelulusan dari Majlis Mesyuarat Negeri Johor bagi melanjutkan pajakan Mukim untuk tanah di Lot 21448 dan Lot 1152, di Jalan Skudai, Johor Bahru, Johor, dari 99 tahun kepada 999 tahun dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan wang tunai berjumlah RM1,300,000.00 kepada kamu di Hotel Hyatt Regency, di Jalan Sungai Chat, di dalam Daerah Johor Bahru di dalam Negeri Johor, untuk tujuan mendapatkan kelulusan tersebut, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 kanun Keseksaan.

(c) The third appellant

(i) Bahawa kamu bersama Md Jhomi bin Md Supian (No. KP: 540516-01-5375) dan Yap You Jee (No. KP: 490216-10-5405) di antara 28 Jun hingga 25 Julai 1995, di Hotel Hyatt Regency, Jalan

A Sungai Chat, di dalam Daerah Johor Bahru, di dalam Negeri Johor dan untuk mencapai niat bersama kamu, telah menipu Dato' Ding Lian Cheon (No. KP: K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa:

B (i) tanah Lot 21448 dan Lot 1152 di Jalan Skudai, Johor Bahru adalah milik Kerajaan Negeri Johor;

(ii) tanah ini boleh dipohon untuk dibangunkan dengan bayaran RM7.5 juta dan premium tidak melebihi RM15 untuk satu kaki persegi;

C (iii) kamu boleh menguruskan permohonan tersebut;

(iv) kelulusan Majlis Mesyuarat Negeri Johor telah diperolehi

dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan sekeping Cashier's Order Hong Kong Shanghai Banking Corporation Limited, Singapore,
D No. 723084 yang bernilai S$3,450,000.00 atas nama Abdul Ghani bin Othman, No. KP: 5834921, bertarikh 13 Julai 1995, kepada Md Jhomi bin M. Supian (No. KP: 540516-01-5375) sebagai pembayaran kerana berjaya mendapat kelulusan permohonan tanah yang berkenaan, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak diperdayakan sedemikian dan
E dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan yang dibaca bersama seksyen 34 Kanun yang sama.

(ii) Bahawa kamu bersama Md Jhomi bin Md Supian (No. KP: 540516-01-5375) pada 10 September 1995, di Hotel Tanahmas,
F Lot 277, Blok 5, Jalan Kampong Nyabor, di dalam Daerah Sibu, di dalam Negeri Sarawak, dan untuk mencapai niat bersama kamu telah menipu Dato' Ding Lian Cheon (No. K/P K314993) seorang pengarah syarikat Solid Estate (Sarawak) Sdn Bhd dengan memperdayakan beliau untuk mempercayai bahawa kamu telah mendapat pembatalan tuntutan premium dan tuntutan
G pelbagai dari Majlis Mesyuarat Negeri Johor bagi permohonan pembelian tanah di Lot 21448 dan Lot 1152 di Jalan Skudai, Negeri Johor oleh syarikat Solid Estate (Sarawak) Sdn Bhd dan dengan itu telah dengan curangnya mendorong Dato' Ding Lian Cheon untuk menyerahkan wang tunai berjumlah
H RM2,000,000.00 kepada kamu pada 23 September 1995, di Hotel Hyatt Regency, di Jalan Sungai Chat di dalam Daerah Johor Bahru, di dalam Negeri Johor, kerana telah berjaya mendapat pembatalan tuntutan premium dan tuntutan pelbagai tersebut bagi permohonan tanah yang berkenaan, yang mana Dato' Ding Lian Cheon tidak akan melakukannya sekiranya tidak
I diperdayakan sedemikian dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 420 Kanun Keseksaan yang dibaca bersama seksyen 34 Kanun yang sama.

[15] It appeared in the notes of proceedings that the previous Sessions Judge will provide written grounds for the *prima facie* case but the grounds of judgment was never written as the previous Sessions Judge was subsequently transferred to the Sessions Court at Butterworth.

The Defence Case

[16] The defence case was heard by another Sessions Judge (the succeeding Sessions Judge). All the three appellants gave evidence under oath. The gist of the defence is as follows.

The First Appellant

[17] The first appellant did not deny the meetings between him and SP1 on several occasions including when he introduced the second appellant to SP1 to discuss the application of the said lands. His defence was that he was merely a land broker and that whatever representation given by him to SP2 in respect of the said lands was based on the representation that was given to him as a broker, by the third appellant. The first appellant said that he was introduced to the second appellant by the third appellant and that he merely introduced the second appellant to SP1 as Mohamed Jhomi and not as the secretary to the Menteri Besar. He further stated that he had no dishonest intention to deceive SP1 and that SP1 was not deceived by him. There was no inducement from him against SP1 for any payment made to the second appellant.

The Second Appellant

[18] The second appellant did not dispute that he was present during those times stated in the charge against him. His defence was that he was promised RM30,000 from Habil (which he had not received until to date) to do certain things and he believed Habil who represented to him that the instructions were taken from the third appellant. The second appellant stated that he took full instructions from Habil and not the third appellant. The second appellant further stated that he was asked to meet a billionaire so he was instructed to wear coat and neck tie and that was the first time that he met the first appellant. The second appellant said he introduced himself as 'Mat' the messenger boy or office boy and that he was told by Habil that the wife of the VIP was actually the third appellant's wife but he never saw her there.

The Third Appellant

[19] The third appellant denied the prosecution's case. The fact that his wife, Rosnani bt Abdul Rahman had collected the RM2 million from SP1 was not sufficient to infer that she went to collect the money on his instruction. He stated that he had never met SP1 and that there was no direct evidence to show that he had deceived SP1 which resulted in SP1 parting with the cashier's order of S$3.45 million.

A **The Findings Of The Trial Court**

[20] At the end of the defence case, the succeeding Sessions Judge found that the appellants failed to raise a reasonable doubt on the prosecution's case. In her grounds of judgment, the succeeding Sessions Judge stated that since she had been directed to continue at the defence case, there was no need
B for her to re-visit or review the prosecution's case, which had been considered by the previous Sessions Judge in deciding that the prosecution had made out a *prima facie* case against the appellants. As such, the succeeding Sessions Judge took the approach to only deal with the defence case in her grounds of judgment.

C

[21] Having found that the appellants had failed to raise a reasonable doubt on the prosecution's case, the succeeding Sessions Judge convicted and sentenced the appellants as follows:

(i) the first appellant was sentenced to three years imprisonment from the
D date of sentence;

(ii) the second appellant was sentenced to two years imprisonment for each charge. The sentences were to run consecutively;

(iii) the third appellant was sentenced to three years imprisonment for each charge. The sentences were to run consecutively.
E

The Appeal To The High Court

[22] Aggrieved by the decision, the appellants filed an appeal to the High Court against the conviction and sentence. Each of the appellant raised various grounds of appeal in the petition of appeal. They had also raised the
F following preliminary issues:

(i) the amendment of the charges by the previous Sessions Judge;

(ii) the wrong standard of proof applied by the previous Sessions Judge in calling for the defence;

G

(iii) the absence of a written grounds of judgment by the previous Sessions Judge at the end of the prosecution's case;

(iv) the failure of the succeeding Sessions Judge to review the case for the prosecution; and

H (v) non-compliance with s. 261 of the Criminal Procedure Code (CPC).

Findings Of The High Court

[23] The High Court Judge found that the preliminary issues were devoid of merits and ruled against the appellants on those preliminary issues. In
I respect of the substantive grounds of appeal, the High Court Judge considered the issue whether the previous Sessions Judge was correct in calling for the appellants to enter their defence. Guided by the cases of *Junaidi Abdullah v. Public Prosecutor* [1993] 4 CLJ 201; [1993] 3 MLJ 217; *Public Prosecutor v.*

Ma'arif [1969] 1 LNS 134; [1969] 2 MLJ 65, and *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800, the High Court Judge then undertook the exercise of evaluating the evidence at the end of the prosecution's case. Having done so and having addressed his mind to the elements of the offence in the charges, the High Court Judge found that there was credible evidence to prove the elements and that the previous Sessions Judge was correct to find that the prosecution had made out a *prima facie* case against the appellants and in calling the appellants to enter their defence.

[24] The High Court Judge then proceeded to examine the defence and having analysed the defence as against all the evidence before the court, found that the appellants failed to cast a reasonable doubt on the prosecution's case. The conviction of the appellants by the succeeding Sessions Judge was thus affirmed. As regards the sentence, the High Court Judge found no reason to disturb the sentences passed by the succeeding Sessions Judge. The sentences were similarly affirmed. Dissatisfied, the appellants filed an appeal to the Court of Appeal.

The Appeal

[25] The main grounds of appeal canvassed by Mr Gobind Singh Deo for the third appellant (which were adopted by Mr Gooi Soon Seng for the first appellant and Mr Prakash for the second appellant) were:

(i) the amendment of the charges;

(ii) the absence of the grounds of judgment by the previous Sessions Judge at the end of the prosecution's case;

(iii) the application of s. 261 of the CPC; and

(iv) the error on the part of the succeeding Sessions Judge in failing to reconsider the prosecution's case and in dealing with only the defence case.

[26] The submission also canvassed on whether the High Court Judge was correct to go through the evidence as if he was the trial judge.

[27] The main issues submitted by Mr Gooi Soon Seng for the first appellant were whether Raizul's statement (exh. P97) was properly admitted under s. 32 of the Evidence Act 1950 and whether the subject matter of the charges were corrupt money paid to the Menteri Besar in order for SP1 to obtain the said lands.

[28] For the second appellant, Mr Prakash had submitted on the credibility of Lim Boey Geok (SP17) whose evidence was not in favour of the prosecution.

A

Findings

[29] We observed that the grounds of appeal are mainly directed to the *prima facie* case. Essentially learned counsel for the respective appellants argued that the prosecution had not made out a *prima facie* case against the appellants.

B

First Issue: The Amendment Of The Charges

[30] On this issue, it was submitted by Mr Gobind that the amendments were prejudicial to the third appellant as they sought to introduce a totally different case for the prosecution against him.

C

[31] Insofar as amendment is concerned, s. 173(h)(ii) of the CPC provides:

> If the court finds that a *prima facie* case has been made out against the accused on an offence other than the offence charged which the Court is competent to try and which in the opinion of the Court it ought to try, the Court shall amend the charge ...

D

[32] We did not lose sight of the fact that there was no ground of judgment written by the previous Sessions Judge to justify the amendment, but this issue was dealt with by the High Court as follows:

> [24] Perayu 3 pada 16.2.1996 telah dituduh dengan satu pertuduhan sahaja di bawah seksyen 420 Kanun Keseksaan dibaca bersama Seksyen 109 Kanun Keseksaan kerana bersubahat dengan Perayu 1 dan Perayu 2.
>
> [25] Pada 16.4.1998 pendakwaan telah meminda pertuduhan asal terhadap Perayu 3 dengan pertuduhan-pertuduhan berikut:
>
> i. Pertuduhan Pertama Pindaan (eksibit P103) di bawah Seksyen 420 Kanun Keseksaan dibaca bersama Seksyen 34 Kanun Keseksaan kerana bersama Perayu 1 dan Perayu 2 untuk mencapai niat bersama telah menipu dan dengan curangnya mendorong Dato' Ding Lian Cheon menyerahkan Cashier's Order bernilai SD3.45 juta.
>
> ii. Pertuduhan Pertama Alternatif kepada Pertuduhan Pertama (eksibit P103A) iaitu di bawah Seksyen 420 Kanun Keseksaan dibaca bersama Seksyen 109 Kanun Keseksaan kerana bersubahat dengan Perayu 1 berkaitan dengan Cashier's Order bernilai SD3.45 juta.
>
> iii. Pertuduhan Kedua Alternatif kepada Pertuduhan Pertama Pindaan (eksibit P103B) iaitu di bawah Seksyen 420 Kanun Keseksaan dibaca bersama Seksyen 109 Kanun Keseksaan kerana bersubahat dengan Perayu 2 berkaitan dengan Cashier's Order bernilai SD3.45 juta.
>
> iv. Pertuduhan Kedua (eksibit P104) iaitu di bawah seksyen 420 Kanun Keseksaan dibaca bersama seksyen 34 Kanun Keseksaan berkaitan dengan wang berjumlah RM 2 juta. Ini merupakan pertuduhan tambahan baru.
>
> [26] Perbezaannya pertuduhan (i) di atas melibatkan "common intention" di bawah s. 34 Kanun Keseksaan manakala di dalam pertuduhan (ii) dan (iii) di atas ianya melibatkan "abetment" di bawah

E

F

G

H

I

s. 109 Kanun Keseksaan. Namun begitu ketiga-tiga pertuduhan tersebut melibatkan Cashier's Order berjumlah SD3.45 juta yang sama kecuali pertuduhan (iv) di atas yang melibatkan RM2 juta.

[27] Pada 17.7.2000 Hakim Mahkamah Sesyen terdahulu telah mengarahkan Perayu 3 dipanggil untuk membela diri terhadap pertuduhan (i) di bawah Seksyen 420 Kanun Keseksaan dibaca bersama Seksyen 34 Kanun Keseksaan iaitu melibatkan "common intention" berkaitan dengan Cashier's Order bernilai SD3.45 juta dan pertuduhan (iv) juga di bawah Seksyen 420 Kanun Keseksaan dibaca bersama Seksyen 34 Kanun Keseksaan berkaitan dengan wang berjumlah RM2 juta tetapi keadaan tidak sama bagi pertuduhan (ii) dan (iii) di bawah Seksyen 420 Kanun Keseksaan dibaca bersama dengan Seksyen 109 Kanun Keseksaan kerana kesemua pertuduhan alternative kepada pertuduhan pertama yang melibatkan "abetment" itu pembelaan langsung tidak dipanggil.

[28] Oleh itu tidak timbullah isu bahawa Hakim Mahkamah Sesyen terdahulu khilaf apabila membenarkan pihak pendakwaan meminda kesemua pertuduhan asal sebab keputusan beliau tidak memanggil pembelaan terhadap pertuduhan alternative kepada pertuduhan pindaan itu berdasarkan pertimbangan telitinya ke atas keterangan keseluruhan di akhir kes pendakwaan. Jadi dalam keadaan sedemikian mana mungkin juga dikatakan ianya telah memprejudiskan ketiga-tiga perayu dalam kes ini.

[33] We agree with the above findings of the High Court Judge that no prejudice had been occasioned to the appellants. Looking at the records of appeal, we find that the amendments were in line with the evidence before the court. The amendments do not introduce a different case against the appellants. The amendments sought to add the elements of cheating and to introduce s. 34 of the Penal Code, based on substantially the same facts. The law is settled that where the facts do not establish a *prima facie* case against the accused on the charge preferred against him but disclose another offence for which he is not charged, the court ought to amend the charge unless there is good reason not to do so (see *Public Prosecutor v. James Tan* [1983] 1 LNS 24; [1983] 2 MLJ 173; *PP v. Jorge Enrique Pellon Tellon* [1998] 4 CLJ 278; [1998] 4 MLJ 183). We therefore find no merits in this ground of appeal.

Second Issue: The Absence Of Grounds Of Judgment For The Prima Facie Case

[34] There is no statutory provision requiring a trial judge to prepare grounds of judgment in finding a *prima facie* case and in calling for the defence (see *Junaidi Abdullah v. Public Prosecutor* [1993] 4 CLJ 201; [1993] 3 MLJ 217; *Abdul Hamid Udin v. PP* [2000] 1 LNS 198; [2006] 6 MLJ 334). The issue of absence of grounds of judgment for the decision at the close of the case of the prosecution would not have arisen in this appeal but for the fact that different Sessions Judges heard the case for the prosecution and the defence. And much has been made out of the fact that the previous Sessions Judge had promised to give a written grounds for the *prima facie* case.

[35] We noted Mr Gobind's submission on the point of fair trial and that he was not able to stand up and submit or challenge the findings or reasons for the *prima facie* case. In our view, the absence of the grounds of the judgment has not prejudiced the appellants. To our mind, what is more important at the close of the case for the prosecution is for the accused to know what is it that he has to answer in his defence. It is not the case here that the appellants were prejudiced for not being able to put up his defence properly. We similarly find this ground of appeal without merits.

Third Issue: s. 261 Of The CPC

[36] Section 261 of the CPC provides:

> 261. Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction in it and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:
>
> Provided as follows:
>
> (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;
>
> (b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if that Court is of opinion that the accused had been materially prejudiced thereby, and may order a new trial.

[37] It was submitted by Mr Gobind that the transfer of a Sessions Judge from one state to another does not cause her to "cease jurisdiction in the matter", a pre-requisite which is mandatory for the operation of s. 261 of the CPC. In support thereof counsel relied on the decision of Syed Agil Barakbah in *Public Prosecutor v. Goh Chooi Guan* [1978] 2 MLJ 169.

[38] We agree with Syed Agil Barakbah J in *Goh Chooi Guan*, *supra* where he opined that a Magistrate ceases to have jurisdiction in a criminal case by his untimely death, retirement or resignation and that the section does not apply in the case of transfer of the Magistrate to another state. We are of the view that where a Magistrate or a Sessions Judge has been transferred to another state, he retains the jurisdiction in the matter and he may continue and complete the cases that he has heard partly. However, to save time and money and to expedite the disposal of part-heard cases, the succeeding Magistrate or Sessions Judge may continue the trial from where the predecessor left.

[39] Coming back to the appeal, the grievance of Mr Gobind arose out of the following grounds of judgment of the succeeding Sessions Judge: A

> Saya telah diarahkan untuk sambung bicara kes ini daripada Hakim Mahkamah Sesyen terdahulu iaitu meneruskan di peringkat pembelaan.

It was the submission of Mr Gobind that the succeeding Sessions Judge has the option to either hear the case *de-novo* or to act on the evidence recorded partly by the previous Sessions Judge. The "directive" given to the succeeding Sessions Judge to take over the matter and to continue at the defence stage, contended learned counsel, is contrary to s. 261. B

[40] We agree that pursuant to s. 261 of the CPC, the succeeding Sessions Judge has a complete discretion to either hear the case *de novo* or to continue from the point where it has been left by the previous Sessions Judge. However we do not agree that the "directive" given to the succeeding Sessions Judge amounts to a breach of the provisions of s. 261. It has been a practice for the Chief Judge or the Chief Registrar to decide on whether the part-heard cases would be completed either by the previous presiding Magistrate or Sessions Judge or by his successor and this decision or 'directive' was purely administrative, given with the primary purpose to speed up the disposal of the part heard cases. The "directive" which was given administratively could not and did not in any way fetter the discretion of the succeeding Magistrate or Sessions Judge provided for under s. 261 of the CPC. The duty remains on the Magistrate or the Sessions Judge to act under the provisions of s. 261 of the CPC. In particular, if the succeeding Magistrate or Sessions Judge acts on the evidence which has been recorded by his predecessor, the right to recall witnesses must be observed. In this appeal, we find no issue on the right of the appellants to recall witnesses. In the circumstances, the 'directive' given to the succeeding Sessions Judge has not prejudiced the appellants and has not breached s. 261 of the CPC. C D E F

Fourth Issue: Failure Of The Succeeding Sessions Judge To Consider All The Evidence At The End Of The Defence Case G

[41] There was another issue relating to s. 261 of the CPC. It was on the approach taken by the succeeding Sessions Judge at the end of the defence case where she took the view that she need not reconsider the case for the prosecution. This is apparent from her grounds of judgment:

> Oleh kerana kes ini tidak di *de novo* tetapi disambung bicara. Justeru itu saya berpendapat keputusan Hakim Mahkamah Sesyen terdahulu tidak perlu dikaji semula oleh saya. Saya dapati segala isu yang dibangkitkan oleh peguambela di dalam kes ini di peringkat pembelaan telah dikemukakan semasa kes pendakwaan. Saya pasti Hakim Mahkamah Sesyen terdahulu telah menimbangkan dengan terperinci isu-isu tersebut sehingga beliau memutuskan pihak pendakwaan telah berjaya membuktikan satu kes *prima facie* terhadap ketiga-tiga OKT. Oleh itu tidak H I

A timbul isu untuk saya revisit/kaji semula kes ini daripada permulaan sehingga di peringkat pendakwaan dan membuat keputusan sekali lagi terhadap kes pendakwaan.

[42] It was submitted by Mr Gobind that in failing to consider the whole evidence, the succeeding Sessions Judge seriously misdirected herself, B resulting in serious miscarriage of justice to the appellants.

[43] We have perused the grounds of judgment of the succeeding Sessions Judge and we noted that at pp. 445-452 of the appeal record vol. 2, the succeeding Sessions Judge had tabulated "Ringkasan Pendakwaan" at the end of the case for the prosecution. Further, reading the grounds of judgment, we C find that the succeeding Sessions Judge had not considered the defence in isolation but had tested the defence in the light of the case for the prosecution (see for example pp. 461-462, 477-479, and 488 of the appeal record vol. 2). In our view, there was sufficient compliance by the succeeding Sessions Judge of s. 173(m)(i) of the CPC which provides that:

D

> At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

[44] Even if the grounds of the succeeding Sessions Judge is lacking or there was an error on her part for stating that she will only consider the E defence, the High Court Judge had meticulously examined the evidence of the prosecution for each instance of the cheating. There were three instances of cheating in this case. The first relates to the cashier's order in the value of S$3.45 million, the second and the third instances were in relation to the sum of RM2 million cash and RM1.3 million cash respectively.

F

[45] In this regard, it was submitted by Mr Gobind that it is wrong for the High Court Judge to look at the evidence as if he was a trial judge. We are not able to agree with learned counsel. In our view, there cannot be a disparity in the powers of an appellate court at different levels in dealing with any error, misdirection or irregularity. Furthermore, an appeal is merely a G continuation of proceedings by way of rehearing and where circumstances warrant, the appeal court may review and re-evaluate the evidence and come to its own findings of fact (see *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800; [2009] 2 MLJ 613).

H **[46]** We do not wish to reproduce the findings of the High Court Judge, suffice to state that we agree with the findings and the reasons given by the High Court Judge in his analysis of the evidence. The High Court Judge has considered the elements of the offence and has looked at all the evidence in making his findings that both the Sessions Judges were correct in calling for the defence and that the defence has failed to raise a reasonable doubt on the I prosecution case, respectively. We also agree with the High Court Judge on the issue of common intention.

Fifth Issue: Common Intention

[47] In the celebrated case of *Mahbub Shah v. Emperor* [1945] 46 Cr LJ 689, two important observations were made in respect of the application of s. 34 of the Penal Code. Firstly, it must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all. If this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act was done by him alone. Secondly, the inference of common intention within the meaning of s. 34 should never be reached unless it is a necessary inference deducible from the circumstance of the case.

[48] In this appeal, there is clear involvement of all the appellants in the whole transaction where the role of the each of the appellants had been analysed by the High Court Judge. There is direct evidence against the first and the second appellants, in particular in the meeting at Hotel Hyatt in Johor Bahru where the cashier's order was given by SP1. Both the first and the second appellants went to Sibu, where the flight tickets were purchased by the first appellant and both were present at Hotel Tanahmas in Sibu where the second appellant brought the purported letter of approval to SP1, which resulted in the payment of RM2 million cash to the second appellant. This payment was collected by the wife of the third appellant. There is also clear evidence that the first appellant informed SP1 that the second appellant was the private secretary to the Menteri Besar of Johor and that the second appellant introduced himself as the private secretary to the Menteri Besar of Johor. SP1 stood firm in cross examination on the above said evidence. In our view, it can reasonably be inferred that the presence and the conduct of the first appellant was in concert pursuant to the prearranged plan to deceive SP1.

[49] The role of the second appellant was undeniably clearer. He was the one who brought the file containing the purported EXCO approval for the application of the said lands and he had shown the purported minutes of the EXCO meeting, to SP1. It was the second appellant who took the cashier's order of S$3.45 million from SP1, allegedly to be passed to the Menteri Besar of Johor. It was also the second appellant who told SP1 that the lease of the said lands could be extended from 99 years to 999 years. And it was the second appellant who had represented to SP1 on the various payments to be made in relation to the application for the said lands. In short, the second appellant was directly involved in getting SP1 to part with the monies forming the subject matter of the charges against him.

[50] Although the third appellant was not present when the monies were given by SP1 to the second appellant, we are satisfied that the third appellant was part of the plan and privy to the deception on SP1. On the error on the lot number, the first appellant said to SP1 that he needed to wait for his boss Dr Johari (the third appellant) to return from *umrah* before the error could

be corrected. Why the need to even refer the error to the third appellant or to wait for the third appellant if the third appellant is not part of the scheme to deceive SP1.

[51] Further, there was clear evidence from the bank officers, Mariana bt Othman (SP12) and Zuraini bt Omar (SP24) as to the involvement of the third appellant in the opening of the bank accounts. The involvement of the third appellant's wife in collecting the RM2 million cash and the third appellant's conduct in opening the bank accounts and in getting some of the monies, in our view led to an inference that the third appellant was indeed involved in the plan to cheat SP1. In particular, we agree with the finding of the High Court Judge that:

> [150] Penjelasan yang munasabah terhadap kehadiran Rosnani binti Abdul Rahman hari itu adalah kerana pakatan yang berlaku hasil dari niat bersama Perayu 2 dan Perayu 3 (suami Rosnani bt Abdul Rahman).

[52] The evidence of SP1 and SP2 disclosed that at the meeting where Rosnani bt Abdul Rahman collected the RM2 million, she was introduced by the second appellant as the wife of the Menteri Besar of Johor. Rosnani was not called by the prosecution but she was offered to the defence. In our view, the non-calling of Rosnani by the prosecution does not create a gap in the prosecution's case, given that there was no dispute as to her identity. The fact remains that she had collected the RM2 million and the third appellant had a fair share in the distribution of the monies cheated of SP1. The conduct of the third appellant, though subsequent to the deception of SP1 is relevant under s. 8 of the Evidence Act 1950.

[53] In our view, the High Court Judge had correctly made inferences from the act or conduct of the appellants in coming to the conclusion that the appellants had the common intention to deceive SP1. We agree with the following findings of the High Court:

> [130] Di antara keterangan-keterangan di dalam kes ini di hadapan Mahkamah ini yang menunjukkan niat bersama Perayu-Perayu adalah seperti berikut:
>
> (i) Perayu 1 dalam usaha untuk meyakinkan SP1 dan kawan SP1 mengenai tanah berkenaan sebenarnya milik kerajaan dan permohonan dibuat kepada/melalui Menteri Besar Johor telah cuba meyakinkan bahawa Perayu 2 sememangnya Setiausaha Sulit Menteri Besar Johor.
>
> (ii) Untuk tujuan itu beliau menjemput Perayu 2 di dalam kawasan Pejabat Menteri Besar di Bukit Timbalan (rujuk muka surat 401-402 dalam Rekod Rayuan). Keadaan ketika menjemput Perayu 2 menunjukkan Perayu 1 memang telah membuat perancangan untuk menjemput Perayu 2 di sana.

(iii) Fakta Perayu 2 dilihat datang dari arah Pejabat di Bukit Timbalan itu dengan pakaiannya berkot, bertali leher dan briefcase (rujuk muka surat 401-402 dalam Rekod Rayuan) jelas menunjukkan Perayu 2 juga telah tahu Perayu 1 akan datang menjemputnya sekitar waktu itu dan telah bersedia dengan penampilan yang meyakinkan.

(iv) Fakta bahawa Perayu 1 tanpa sebab tertentu membawa SP4 untuk menjemput Perayu 2 juga jelas menunjukkan rancangan diatur sebegitu rupa untuk meyakinkan bahawa Perayu 2 sememangnya Setiausaha Sulit Menteri Besar Johor seperti yang didakwanya kemudian di hotel setelah diperkenalkan kepada SP1 (rujuk muka surat 119 dalam Rekod Rayuan).

(v) Kesediaan Perayu 1 menunggu dan berlegar dengan kereta dalam kawasan Bukit Timbalan tanpa cuba mendapat Perayu 2 di pejabatnya adalah langkah untuk mengelakkan identiti sebenar Perayu 2 diketahui. (rujuk muka surat 401-402 dalam Rekod Rayuan).

(vi) Perayu 1 sendiri tahu bahawa Perayu 2 bukan Setiausaha Sulit Menteri Besar Johor. Itulah juga sebabnya bila SP2 mengajaknya mencari Perayu 2 di Pejabat Menteri Besar bila SP1 menyedari kesilapan pada nombor lot tanah yang diluluskan beliau dengan memberi alasan Perayu 2 seorang yang sibuk dan jarang berada di Pejabat (rujuk muka surat 276 Rekod Rayuan). Ini menunjukkan dengan jelas pengetahuan salah dan niat jahat kedua-dua Perayu 1 dan Perayu 2.

(vii) Wujudnya rancangan/niat bersama ini dikuatkan lagi dengan adanya permohonan yang dibuat oleh SP1 iaitu surat permohonan tanah bertarikh 3.7.1995 (eksibit P3) dalam beg/fail yang dibawa Perayu 2 pada 25.7.1995 di Hyatt Hotel (rujuk muka surat 120 Rekod Rayuan).

Sixth Issue: s. 112 Statement Of Raizul (Exh. P97)

[54] Raizul was the person who had disguised as Menteri Besar, Abdul Ghani bin Othman. His statement was recorded by the police under s. 112 of the CPC where he had revealed the events surrounding the opening of the bank accounts in Singapore and Johor Bahru and the involvement of the second and the third appellants in respect of the opening of the accounts. It was submitted that the trial judge fell into error when admitting the statement of Raizul as s. 32 of the Evidence Act 1950 had not been complied with.

[55] According to the investigating officer, ASP Chew Kam Soon (SP30) a subpoena was served on Raizul to attend court and Raizul did attend court once. Due to his failure to attend court on a subsequent date, a warrant of arrest was issued but the warrant could not be executed on him. Raizul could not be traced notwithstanding the following efforts by the police:

(i) the police went to look for him at his address;

(ii) an advertisement was put up in the newspapers, namely Utusan Malaysia, Harian Metro, Malay Mail and Sin Chew Jit Poh; and

(iii) an application was made to the Interpol to trace Raizul in Indonesia.

[56] Mr Gooi contended that all the efforts were done at the eleventh hour whilst in the midst of the trial and that the prosecution had failed to avail itself of the various provisions in the CPC namely ss. 47, 49, 118 and 396 on the issuance of warrants and the execution of a bond to ensure the attendance of Raizul in court. Relying on *PP v. Lee Jun Ho & Ors* [2009] 4 CLJ 90; [2011] 6 MLJ 220, Mr Gooi submitted that Raizul is an important witness in this case who can unfold the narratives of the prosecution's case and that the failure of the police to take all reasonable and practicable steps to trace Raizul rendered his statement inadmissible under s. 32 of the Evidence Act 1950.

[57] We find the facts in *Lee Jun Ho*, *supra* distinguishable. In *Lee Jun Ho*, there was not a single proactive effort by the police to procure the attendance of a material, relevant and important eye-witness. The court thus found that the police failed to take all reasonable and practicable steps to trace the witness. In our case, there was a search for Raizul at his address, an advertisement in the newspapers and seeking the assistance of the Interpol. These are reasonable efforts taken by the police to trace Raizul. The failure of the police to make use of ss. 47, 49, 118 and 396 does not render the statement of Raizul inadmissible. We find that exh. P97 was correctly admitted under s. 32 of the Evidence Act 1950.

[58] There was another complaint in respect of exh. P97. It was submitted that Raizul was an accomplice and the trial judge had failed to address the law on this point and had thus caused serious miscarriage of justice to the appellants.

[59] Raizul's statement exh. P97 disclosed that he had no clue why he had to go to the banks and why the accounts had to be opened. He was merely following the instruction of the third appellant, his "guru silat". He had no knowledge that SP1 was deceived. In our view, Raizul is an accessory after a fact. Strictly speaking, an accessory after a fact cannot be an accomplice in the commission of the original offence (see *Kuan Ted Fatt v. Public Prosecutor* [1985] 1 CLJ 150; [1985] CLJ (Rep) 174; [1985] 1 MLJ 211). Nevertheless, what remains is whether the statement in exh. P97 has been corroborated. We find that the events stated by Raizul therein, in particular, in respect of the role played by the third appellant in opening the accounts, were corrobated by the bank officers, SP12 and SP24. In the circumstances we are of the view that even without the usual corroboration warning, no miscarriage of justice had occasioned to the appellants by the admission of exh. P97.

[60] Mr Gooi had further submitted that SP1 knew very well that the monies were corrupt monies paid for political fund. We find this submission to be devoid of any merits. There was no evidence to show that the monies were indeed paid to the political fund of UMNO. What was established by the evidence was that the monies ended up in several bank accounts and distributed among others, the appellants. On the facts, we find this to be a clear case of cheating as the monies were paid by SP1 in consideration of the said lands, which SP1 ultimately failed to obtain.

Seventh Issue: The Credibility Of SP17

[61] Mr Prakash raised the point that the prosecution had led two sets of evidence on the receipt of the monies from Hong Kong and Shanghai Bank, Singapore. The evidence of Lim Boey Geok (SP17) showed that Habil (who is at large) acted as the introducer for her to open the premier current account and premier saving account at Maybank Larkin, Johor Bahru wherein a deposit of RM3 million was made. This same amount was withdrawn a week later by way of a cash cheque and the cash, according to SP17, was given to Habil.

[62] The evidence of SP17 therefore implicates Habil as the person who was involved in opening the accounts and who received the RM3 million cash. This evidence is at variance with the evidence of the Maybank officers, Lee Choon Leng (SP16) and Yeow King Siong (SP19). SP16 positively identified the third appellant as the introducer to SP17 in opening the premier accounts. SP16 stated that he knew the third appellant because the third appellant's shop was opposite the bank premises and the third appellant had an account with the bank. SP19 had also identified the third appellant in court as the person who had introduced himself as "Johari Mansor" and who had collected the RM3 million cash and who had put the money in a brief case.

[63] It was thus submitted for the second appellant that there was a contradiction in the prosecution's case as SP17 who had given evidence not favourable to the prosecution was never impeached nor treated as a hostile witness.

[64] In our view, the evidence of SP17 does not affect the prosecution's case. We agree with the following finding of the High Court Judge on SP17:

> [179] SP17 adalah saksi berpihak ('bias witness'). SP17 cuba untuk tidak mengaitkan Perayu 3 dan meletakkan kesemuanya kepada Habil. SP17 apabila ditanya mengenai siapa bos Habil menjawab tidak tahu (rujuk muka surat 447 Rekod Rayuan) dan hanya setelah dirujuk eksibit D28 barulah mengaku yang Habil adalah pekerja Perayu 3 dan Perayu 3 adalah bos Habil (rujuk muka surat 457 dalam Rekod Rayuan).
>
> [180] SP16 dan SP19 adalah pegawai-pegawai bank yang tidak mempunyai apa-apa kepentingan dan keterangan mereka jelas menunjukkan Perayu 3 yang hadir bersama SP17 dan bukan Habil.

[65] On a maximum evaluation of the evidence led by the prosecution, we are satisfied that the elements of the offence in the charges have been proved. We are of the view that the High Court Judge did not err in his finding that the evidence adduced by the prosecution disclosed a *prima facie* case for the appellants to answer.

[66] Insofar as the defence is concerned, we find that the succeeding Sessions Judge had considered the defence as against the evidence of the prosecution in coming to the conclusion that the appellants had failed to raise a reasonable doubt on the prosecution's case.

[67] The succeeding Sessions Judge and the High Court Judge considered the first appellant's presence and involvement in getting SP1 to prepare the cashier's order, his presence together with the second appellant in Sibu when the purported approval letter was shown to SP1 and his share of the division of the monies where RM1.8 million was deposited into his account three days after the cashier's order was given to the second appellant. The first appellant's denial of writing the particulars of Abdul Ghani bin Othman and the identity card number had similarly been considered by the succeeding Sessions Judge and the High Court Judge. The first appellant's explanation on the RM1.8 million credited into his account, purportedly for the joint venture project with the third appellant had been sufficiently evaluated by both the succeeding Sessions Judge and the High Court Judge.

[68] As regards the second appellant, the succeeding Sessions Judge and the High Court found that the defence was merely a bare denial and that he was trying to protect the third appellant, who was his "guru silat", his boss and his brother in law. His defence that he introduced himself as the messenger boy or office boy to SP1 was evaluated by the courts below before concluding that the defence was not credible and had not raised a reasonable doubt on the case for the prosecution.

[69] Similarly, the defence of the third appellant had been judicially appreciated by the succeeding Sessions Judge and the High Court Judge. In particular, the third appellant's denial that he was involved in the opening of the bank accounts with Raizul was considered by the courts below in the light of the evidence of the prosecution witnesses, namely the bank officers who had no interest in this case. Both the courts below found that the defence of the third appellant was a bare denial and had not raised a reasonable doubt on the case for the prosecution.

[70] We agree with the analysis of the defence by the succeeding Sessions Judge and the High Court Judge and we find no reason to depart from their findings that the defence of the appellants did not raise a reasonable doubt on the prosecution's case. In our view, the necessary inferences drawn from the circumstances, taken cumulatively, are that the appellants are part of and privy to the plan to deceive SP1.

[71] In considering the issues raised by learned counsel for the respective appellants, we had asked ourselves the question whether on the totality of the evidence, the convictions of the appellants are safe. Without doubt, we find that the convictions are safe. We therefore unanimously dismiss all the three appeals against conviction and we affirm the order of the Sessions Court as upheld by the High Court.

Sentences

[72] For the first appellant, Mr Gooi applied for a bound over or if the court is not with him, for a lenient sentence given that it has been 20 years since the offence was committed and considering that the first appellant is 67 years old. For the second appellant who is 62 years old, Mr Prakash similarly prayed for a bound over under s. 294 of the CPC. Mr Prakash further submitted that the sentences should be concurrent rather than consecutive. Mr Gobind for the third appellant similarly prayed for the sentences to run concurrently as the offences were part of the same transaction involving the same complainant. Both Mr Prakash and Mr Gobind echoed the submissions of Mr Gooi on the fact that the offences were committed 20 years ago.

[73] It is an established principle that an appellate court should be slow to disturb the sentence passed by the court below unless the sentence is manifestly wrong in the sense of being illegal or being unsuitable to the proved facts and circumstances (see *Public Prosecutor v. Mohamed Nor & Ors* [1985] 1 LNS 170; [1985] 2 MLJ 200; *Bhandulananda Jayatilake v. Public Prosecutor* [1981] 1 LNS 139; [1982] 1 MLJ 83; *PP v. Dato' Waad Mansor* [2005] 1 CLJ 421; [2005] 2 MLJ 101).

[74] In these appeals, the succeeding Sessions Judge had considered both the public interest and the interest of the appellants and had taken into account the age of the appellants; the fact that the appellants were first offenders; that the offence was a serious offence as it involved big amount of money and that it had implicated the State Government and the Menteri Besar. In deciding on the term of imprisonment, the succeeding Sessions Judge had also considered the fact that the victim could not recover the money and that no punishment of whipping could be imposed on the appellants due to their age.

[75] The above factors taken into consideration by the succeeding Sessions Judge are relevant factors in imposing sentence. Since it has not been shown that the succeeding Sessions Judge had embarked on some extraneous or irrelevant factors in imposing the sentences against the appellants, and having considered the submissions of learned counsel for the respective appellants, we find no reason to disturb the sentences imposed by the succeeding Sessions Judge which had been affirmed by the High Court. Further, we are of the view that the sentences are appropriate in the circumstances of the case.

[76] In respect of the second and the third appellants, in determining whether the sentences should be concurrent or consecutive, we are guided by the one transaction rule where four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572; [2004] 2 MLJ 534). In these appeals, we find that there was no proximity of time and place as the charges relate to different dates and places and different purpose and we find that the aggregate sentences do not offend the totality principle.

[77] The appeals against sentences are thus similarly dismissed.

Conclusion

[78] In the upshot, the appeals are dismissed and the convictions and sentences are affirmed.